**13–4505(D) Appointment of experts; costs—Party's retention of own expert.**

**.010** This section does not prohibit any party from retaining its own expert to conduct any additional examinations at its own expense, but the trial court retains discretion whether to order the defendant to undergo additional examinations.

*State v. Bunton,* 230 Ariz. 51, 279 P.3d 1213, ¶¶ 7–8 (Ct. App. 2012) (trial court appointed psychiatrist and board-certified neuropsychologist to evaluate defendant, and both opined defendant was incompetent and unlikely to improve; at second hearing, psychologist from restoration program testified defendant was incompetent; all three stated they did not need additional assistance or testing; court held trial court did not abuse discretion in denying state's request to have defendant examined further).

**21–202 Persons entitled to be excused from jury service.**

**.020** A.R.S. § 21–202(B)(3), which requires dismissal of prospective jurors not currently capable of understanding the English language, serves a significant state interest because it would place an undue burden on the state to have to translate for non-English speaking or reading jurors.

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 13–16 (2012) (court held trial court properly denied defendant's motion to preclude jury commissioner from excluding non-English speaking persons from master jury list).

**.030** Non-English speaking persons are not a distinctive group for Sixth Amendment purposes.

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶ 15 (2012) (court held statute was not unconstitutional merely because it excluded Hispanic non-English speaking persons).

**28–101(2) Definitions—Alcohol concentration.**

**.010** "Alcohol concentration," if expressed as a percentage, means either the number of grams of alcohol per 100 milliliters of blood or the number of grams of alcohol per 210 liters of breath.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 9, 25 (Ct. App. 2012) (because A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios was not relevant to charge under § 28–1381(A)(2)).

**28–622.01 Unlawful flight from pursuing law enforcement vehicle.**

**.030** An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red or red and blue light or lens visible from in front of the vehicle, a police vehicle does not have to have its emergency lights activated for a person to be guilty of unlawful flight from law enforcement vehicle; all that is necessary is for the vehicle to be appropriately marked showing it to be an official law enforcement vehicle.

*State v. Martinez,* 230 Ariz. 382, 284 P.3d 893, ¶¶ 5–9 (Ct. App. 2012) (officer was driving marked police car that displayed police decals and was equipped with overhead lights and sirens; officer stopped defendant by turning on overhead lights; officer discovered defendant's driver's license was suspended, and when confronted with that information, defendant drove away; officer pursued defendant but then discontinued pursuit; court held it did not matter whether jurors found officer had overhead lights on because evidence showed vehicle was appropriately marked and defendant knew it was law enforcement vehicle).

**28–624(B) Authorized emergency vehicles—Exemptions.**

**.010** If the driver of an authorized emergency vehicle is operating at least one lighted lamp displaying a red or red and blue light or lens, the driver is exempt from certain traffic regulations, such as speed limits and proceeding through stop signs and traffic lights.

*State v. Martinez,* 230 Ariz. 382, 284 P.3d 893, ¶¶ 5–9 (Ct. App. 2012) (court held police vehicle did not have to have emergency lights activated for person to be guilty of unlawful flight from law enforcement vehicle).

**28–624(C) Authorized emergency vehicles—Application of exemptions.**

**.010** An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red or red and blue light or lens visible from in front of the vehicle.

*State v. Martinez,* 230 Ariz. 382, 284 P.3d 893, ¶¶ 6–9 (Ct. App. 2012) (court held police vehicle did not have to have emergency lights activated for person to be guilty of unlawful flight from law enforcement vehicle).

**28–1321(A) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Implied consent to submit to test.**

**.010** If a person operates a motor vehicle in this state and is arrested for any DUI offense, that person gives consent to a BAC test or tests.

*State v. Butler (Tyler B.),* 231 Ariz. 42, 290 P.3d 435, ¶ 9 (Ct. App. 2012) (court notes person has power, but not right, to refuse to submit to a BAC test).

**.020** Because blood evidence is not testimonial, it is not subject to suppression on a Fifth Amendment voluntariness basis.

*State v. Butler (Tyler B.),* 231 Ariz. 42, 290 P.3d 435, ¶¶ 7–11 (Ct. App. 2012) (juvenile admitted smoking marijuana and then driving; officer arrested him for DUI; juvenile agreed both verbally and in writing to BAC blood testing; although juvenile's father was waiting nearby, officer did not ask father for any consent; court held results of BAC test were not subject to suppression on voluntariness basis).

**28–1321(B) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Refusal to submit to test.**

**.010** A person has the power, but not the right, to refuse to submit to a BAC test.

*State v. Butler (Tyler B.),* 231 Ariz. 42, 290 P.3d 435, ¶ 9 (Ct. App. 2012) (juvenile admitted smoking marijuana and then driving; officer arrested him for DUI; juvenile agreed both verbally and in writing to BAC blood testing; although juvenile's father was waiting nearby, officer did not ask father for any consent; court held Parents' Bill of Rights did not apply, thus father's consent was not necessary).

**28–1381(A)(1) Driving or actual physical control—Person under the influence of intoxicating liquor.**

**.040** In a (A)(1) charge, either party may introduce evidence of the defendant's BAC.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–17 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

**.050** The statutory presumptions arise if a party introduces evidence of the defendant's BAC in a (A)(1) charge, and the trial court has a duty to so instruct the jurors if such evidence is introduced.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–18 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

**.060** Once a party introduces evidence of the defendant's breath BAC in a (A)(1) charge, testimony about breath-to-blood partition ratios is relevant, and that includes partition ratios in the general population, and not just the defendant's partition ratio at the time of the breath test.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 19–25 (Ct. App. 2012) (court rejected state's argument that partition ratio evidence is limited to defendant's partition ratio at time of breath test).

**.070** If a party introduces evidence of a BAC reading taken from a breathalyzer, testimony of how breathing patterns, breath and body temperature, and hematocrit (device for separating cells and other particulate elements of blood from plasma) could affect the BAC reading is relevant.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 26–30 (Ct. App. 2012) (court rejected state's argument that such evidence is inadmissible unless defendant can offer evidence of own physiology at time of breath test).

**28–1381(A)(2) Driving or actual physical control—0.08 percent or more by weight of alcohol.**

**.060** Although it is the amount of alcohol in the blood that causes impairment, because A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios is not relevant to a charge under § 28–1381(A)(2).

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶ 25 (Ct. App. 2012) (court reaffirms this holding from *Guthrie v. Jones*).

**28–1381(D) Persons under the influence of intoxicating liquor or drugs—Affirmative defense.**

**.010** This section provides a defendant with an affirmative defense, thus the defendant has the burden of proving by a preponderance of the evidence the defendant used prescription drugs as prescribed by a licensed medical practitioner.

*State v. Bayardi (Fannin),* 230 Ariz. 195, 281 P.3d 1063, ¶¶ 2–23 (Ct. App. 2012) (court rejected defendant's contention that this section provided either justification defense or defense denying element of charge; court concluded trial court erred in ruling this section created justification defense and thus state had to proved beyond reasonable doubt defendant was not using prescription drugs as prescribed by medical practitioner; court held this established affirmative defense, thus defendant had burden of proving by preponderance of evidence he used prescription drugs as prescribed by licensed medical practitioner).

**28–1381(G) Persons under the influence of intoxicating liquor or drugs— Presumptions.**

**.010** In a (A)(1) charge, either party may introduce evidence of the defendant's BAC.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–17 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

**.020** The statutory presumptions arise if evidence of the defendant's BAC is introduced in a (A)(1) charge, and the trial court has a duty to so instruct the jurors if such evidence is introduced.

*State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–18 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

March 7, 2013

## ARTICLE III. RIGHTS OF PARTIES.

### RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

**Rule 6.1(a) Rights to counsel; waiver of rights to counsel—Right to be represented by counsel.**

**6.1.a.040** In a criminal DUI case, the suspect has the right to consult with an attorney prior to the administration of a breathalyser test as long as the consultation does not disrupt an on-going investigation.

*State v. Penny,* 229 Ariz. 32, 270 P.3d 859, ¶¶ 9–13 (Ct. App. 2012) (defendant asked to consult with attorney before deciding whether to take blood test; officer placed defendant in telephone room; defendant advised officer yellow pages for attorneys had been removed from telephone book; officer told defendant that was not his (officer's) problem; court held trial court did not abuse discretion in finding officer had interfered with defendant's right to consult with attorney; court remanded for trial court to determine whether suppression or dismissal was appropriate remedy).

**Rule 6.1(b) Rights to counsel; waiver of rights to counsel—Right to appointed counsel.**

**6.1.b.090** The trial court is not required to hold an evidentiary hearing on a motion for change of counsel if the motion fails to allege specific facts suggesting an irreconcilable conflict or a complete breakdown in communications, or if there is no indication that a hearing would elicit additional facts beyond those already before the trial court.

*State v. Gomez,* ___ Ariz. ___, 293 P.3d 495, ¶¶ 18–29 (2012) (defendant had been acting *pro se* with two advisory attorneys since 2006; after numerous delays and failures by defendant to comply with discovery rules, April 14, 2009, trial court revoked defendant's *pro se* status and appointed advisory counsels to represent him; December 8, 2009, nearly 5 weeks before trial was scheduled to begin, defendant filed *pro se* motion for change of counsel; December 18, 2009, attorney from Dominican Republic filed motion criticizing one appointed counsel; February 4, 2010, that appointed counsel filed motion to withdraw; February 25, 2010, trial court, without objection, said it would resolve pending matters without hearing or oral argument; court noted neither defendant's motion for change of counsel nor counsel's motion to withdraw alleged specific facts suggesting irreconcilable conflict or complete breakdown in communications, or completely fractured relationship, and thus held trial court did not abuse discretion when it denied requests without holding hearing).

**Rule 6.1(c) Rights to counsel; waiver of rights to counsel—Waiver of right to counsel.**

**6.1.c.110** A defendant who has made an unequivocal request for self-representation may abandon that request, which will be determined by the totality of the circumstances.

*State v. McLemore,* 230 Ariz. 571, 288 P.3d 775, ¶¶ 29–36 (Ct. App. 2012) (defendant was represented by public defender; nearly 1 year prior to trial; defendant filed "Notice To Proceed as Pro Per" citing Rule 6; defendant had copies sent to clerk of court, trial judge; prosecutor; attorney at Office of Legal Defender who had been representing co-defendant, but not to his own attorney; trial court never set hearing on motion; court noted defendant

had numerous opportunities to inform trial court of pending motion, including hearing on whether public defender could continue representing defendant after moving to Office of Legal Defender; court concluded defendant's failure to act reflected intent to abandon motion to represent himself).

**Rule 6.1(c) Rights to counsel; waiver of rights to counsel—Misconduct during self-representation.**

**6.1.c.800** A defendant who is incapable of abiding by the basic rules of the court is not entitled to self-representation, thus a trial court may terminate self-reprsentation by a defendant who deliberately engages in serious and obstructionist misconduct.

*State v. Gomez*, ___ Ariz. ___, 293 P.3d 495, ¶¶ 7–17 (2012) (in May 2007, after defendant had represented himself for 10 months, trial court told defendant, his advisory counsel, and his mitigation consultant they needed to set realistic schedule for completing their mitigation investigation; in August 2007, trial court set "firm" trial date for September 2008, and told defendant it would revoke defendant's *pro se* status if he failed to follow rules; in May 2008, defendant told trial court he needed at least another 18 months to prepare; trial court reset trial for June 2009 and again warned defendant to comply with rules; mitigation special master set November 2008 deadline for completing all psychological testing, but defendant twice failed to meet with defense psychologist; in November 2008, trial court denied defendant's request to change advisory counsel and again warned defendant to comply with rules; in December 2008, trial court denied defendant's motion to extend discovery deadlines and ordered defendant to make all required disclosure by January 23, 2009; in January 2009, defendant disclosed names of 360 witnesses, but disclosed no addresses or expert reports; trial court then gave defendant until March 25, 2009, to comply with Rule 15.2 and again warned defendant to comply with rules; on March 25, 2009, defendant filed notice listing hundreds of witnesses, but telephone numbers and addresses for only about 80 of them; at hearing on March 30, 2009, defendant disclosed psychologist and neuropsychologist who had not yet examined him, and said reports would be done before June 1, 2009, trial date; at April 14, 2009, show cause hearing, trial court revoked defendant's *pro se* status and appointed attorneys who had served as advisory counsel since 2006 to represent him; because of conflicts in attorneys' schedules, trial did not occur until September 2010; court noted trial court revoked defendant's *pro se* status only after it became evident defendant's continued self-representation would undermine trial court's authority and ability to conduct proceeding in efficient and orderly manner, and held trial court did not abuse discretion in doing so).

## RULE 7. RELEASE.

**Rule 7.2(c)(2)(A) Right to release—Appeal from court of limited jurisdiction.**

**7.2.c.2.a.010** When a defendant has been tried in a court of limited jurisdiction and convicted of any offense for which a sentence of incarceration has been imposed, upon filing of a timely notice of appeal, the defendant shall remain, pending appeal, under the same release conditions imposed at or subsequent to the time of the defendant's initial appearance or arraignment.

*Scheerer v. Munger*, 230 Ariz. 137, 281 P.3d 491, ¶10 (Ct. App. 2012) (once state filed notice of appeal, trial court should have stayed sentence).

## RULE 8. SPEEDY TRIAL.

### Rule 8.5(a) Continuances—Form of motion.

**8.5.a.020** A party requesting a continuance must show extraordinary circumstances exist and must state with specificity in the motion the reasons justifying the continuance.

*State v. VanWinkle,* 230 Ariz. 387, 285 P.3d 308, ¶¶ 6–14 (2012) (because defendant's attorney made only general statements about needing more time to investigate and prepare; trial court did not abuse discretion in denying motion to continue; to extent defendant's attorney stated in motion he needed to interview state's witness and conduct pretrial investigation into mitigation topics, and that he had to write several more motions, he could have detailed what defense team had done already and what tasks were left to be completed).

## RULE 9. PRESENCE OF DEFENDANT, WITNESSES AND SPECTATORS.

### Rule 9.3(a) Exclusion of witness and spectators—Witnesses.

**9.3.a.010** If a party so requests, the trial court must exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses.

*State v. Patterson,* 230 Ariz. 270, 283 P.3d 1, ¶ 32 (2012) (court held trial court did not err in excluding defendant's mitigation witness during aggravation phase of trial).

## RULE 10. CHANGE OF JUDGE OR PLACE OF TRIAL.

### Rule 10.1(a) Change of judge for cause—Grounds.

**10.1.a.020** The bias and prejudice necessary to disqualify a judge must arise from an extrajudicial source, thus judge's participation in the legal proceedings will not constitute a basis for a claim of bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

*State v. Tatlow,* 231 Ariz. 34, 290 P.3d 228, ¶¶ 19–20 (Ct. App. 2012) (merely because trial court had presided in drug court program and thus had personal knowledge of defendant's termination from that program did not support defendant's claim that trial court should have recused itself from probation revocation proceedings).

## RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS.

### Rule 11.3(a) Appointment of experts—Grounds for appointment.

**11.3.a.010** The defendant is entitled to a mental examination and hearing when reasonable grounds for an examination exist; reasonable grounds exist when there is sufficient evidence to indicate that the defendant is not able to understand the nature of the proceedings against him and to assist in the defense.

*State v. Mendoza-Tapia,* 229 Ariz. 224, 273 P.3d 676, ¶¶ 18–25 (Ct. App. 2012) (defendant was convicted 8/08; 10/08, defendant's attorney filed motion for pre-sentencing competency examination; 1/09, trial court found defendant incompetent and ordered restoration proceedings; 5/09 competency report indicated defendant was competent; 9/09, trial court found defendant competent and set sentencing for 10/09; day before sentencing, defendant's attorney filed motion asking trial court to order retroactive competency examination to determine whether defendant had been competent to stand trial; court noted defendant's attorney never raised issue of defendant's competence prior to trial and information presented was essentially speculation, thus trial court did not abuse discretion in denying motion for retroactive competency examination).

**Rule 11.3(g) Appointment of experts—Additional expert assistance.**

**11.3.g.010** This section permits a trial court to order a defendant to submit to examination by additional experts only if necessary to determine properly the defendant's competency.

*State v. Bunton,* 230 Ariz. 51, 279 P.3d 1213, ¶¶ 9–11 (Ct. App. 2012) (trial court appointed psychiatrist and board-certified neuropsychologist to evaluate defendant, and both opined defendant was incompetent and unlikely to improve; at second hearing, psychologist from restoration program testified defendant was incompetent; all three stated they did not need additional assistance or testing; court held trial court did not abuse discretion in denying state's request to have defendant examined further).

## ARTICLE IV. PRETRIAL PROCEDURES.

### RULE 13. INDICTMENT AND INFORMATION.

**Rule 13.3(a) Joinder—Offenses.**

**13.3.a.010** An indictment or information is multiplicative (multiplicitous) if it charges a single offense in multiple counts; an indictment or information is duplicative (duplicitous) if it charges multiple offenses in a single count.

*State v. Butler,* 230 Ariz. 465, 286 P.3d 1074, ¶¶ 12–13 (Ct. App. 2012) (indictment for possessing deadly weapon during drug offense charged defendant with possessing 9 mm pistol, .40 caliber handgun, and .380 caliber pistol; because this could have been charged as three separate offenses of possessing a deadly weapon, indictment was duplicative (duplicitous)).

**13.3.a.015** A duplicative (duplicitous) indictment or information charges two or more distinct and separate offenses in a single count, while a duplicative (duplicitous) charge exists when the text of the indictment or information refers to only one criminal act, but the state introduces multiple alleged criminal acts to prove the charge.

*State v. Butler,* 230 Ariz. 465, 286 P.3d 1074, ¶¶ 12–13 (Ct. App. 2012) (indictment for possessing deadly weapon during drug offense charged defendant with possessing 9 mm pistol, .40 caliber handgun, and .380 caliber pistol; because this could have been charged as three separate offenses of possessing a deadly weapon, issue was duplicative (duplicitous) indictment, rather than duplicative (duplicitous) charge, as defendant claimed).

**13.3.a.017** A defendant who fails to challenge a duplicative (duplicitous) indictment or information before trial waives the issue unless the defendant can establish fundamental error.

*State v. Butler,* 230 Ariz. 465, 286 P.3d 1074, ¶¶ 12–18 (Ct. App. 2012) (indictment for possessing deadly weapon during drug offense charging defendant with opossessing 9 mm pistol, .40 caliber handgun, and .380 caliber pistol was duplicative (duplicitous) because it could have charged three separate offenses of possessing a deadly weapon; defendant did not object; court stated defendant traded risk on non-unanimous jury for reward of only one potential conviction and sentence, and increased his chance of acquittal by combining in one count separate offenses for which he did not have equally compelling defenses, and further stated that, rather than suffering prejudice, defendant simply gambled and lost).

**Rule 13.3(a)(3) Joinder of offenses—Common scheme or plan.**

**13.3.a.310** A common scheme or plan is narrowly construed, and must be a particular plan of which the charged crime is a part.

*State v. Hausner,* 230 Ariz. 60, 280 P.3d 604, ¶¶ 43–47 (2012) (trial court did not abuse discretion in finding killings were part of over-arching criminal plan to seek thrills or excitement from killing people or animals).

**Rule 13.4(a) Severance—In general.**

**13.4.a.060** A defendant is entitled to a severance under the "rub off" theory, which holds it is prejudicial when the jurors' unfavorable impression of a codefendant, against whom evidence is properly admitted, will influence the way the jurors view the defendant, but is not entitled to severance when jurors would be able to keep separate the evidence against each defendant.

*State v. Tucker,* 231 Ariz. 125, 290 P.3d 1248, ¶¶ 41–43 (Ct. App. 2012) (because prosecutor kept separate evidence against each defendant, and trial court properly instructed jurors, trial court did not abuse discretion in denying severance).

**13.4.a.070** A defendant is entitled to a severance under the disparity of evidence theory, which holds that it is prejudicial when there is a small amount of evidence against one defendant and a large amount of evidence against the other defendant or defendants, but there must be a great disparity in the amount of evidence, and an instruction that the defendant is entitled to have his or her guilt proved only by the defendant's own conduct and the evidence against that defendant as though that defendant were being tried alone will minimize the risk that the jurors will consider the evidence against one defendant against the other defendant.

*State v. Tucker,* 231 Ariz. 125, 290 P.3d 1248, ¶¶ 44–45 (Ct. App. 2012) (because prosecutor kept separate evidence against each defendant, and trial court properly instructed jurors, trial court did not abuse discretion in denying severance).

**13.4.a.110** In order to be entitled to a new trial because of the refusal of the trial court to grant a severance, the defendant must show that the defendant was prejudiced by the failure of the trial court to grant the motion to sever.

*State v. Hausner,* 230 Ariz. 60, 280 P.3d 604, ¶¶ 48 (2012) (because trial court instructed jurors to consider each charged offense separately and that state had to prove each charged offense beyond reasonable doubt, defendant could not show prejudice from joinder of charges).

**RULE 15. DISCOVERY.**

**Rule 15.1(b) Disclosure by state—Supplemental Disclosure; Scope—Matters relating to guilt, innocence or punishment.**

**15.1.b.050** The state is required to disclose the results of scientific tests, experiments or comparisons that have been completed, thus if the test, experiment, or comparison has not been completed, there is nothing for the state to disclose at that time.

*State v. Simon (Jimenez),* 229 Ariz. 60, 270 P.3d 887, ¶¶ 8–9 (Ct. App. 2012) (because testing results from blood samples were not done by date of case management conference, trial court entered order precluding state from introducing any future testing results; because testing was not complete, state had nothing to disclose, thus trial court erred in finding that state had violated rule of discovery and thus trial court abused discretion in imposing sanction).

**Rule 15.7(a) Sanctions—Failure to make disclosure.**

**15.7.a.030** The choice of which sanction to impose is within the trial court's discretion; the sanction should be proportional to the harm caused and should be the least restrictive under the circumstances, and the defendant must show prejudice in order to obtain relief on appeal.

*State v. Patterson,* 230 Ariz. 270, 283 P.3d 1, ¶¶ 22–24 (2012) (defendant objected to prosecutor's disclosure of PowerPoint presentation on day of closing argument; court noted defendant did not explain how late disclosure prejudiced him, and found no prejudice evident from record).

**15.7.a.040** In determining whether to impose sanctions, the trial court should consider (1) how vital the witness is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances.

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 48–61 (2012) (court found discovery violation, but held trial court properly exercised discretion in providing remedy other than precluding testimony).

**15.7.a.060** Preclusion is a sanction of last resort, thus a trial court may not impose preclusion as a sanction unless it determines that no lesser sanction will remedy the discovery violation.

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 48–61 (2012) (court found discovery violation, but held trial court properly exercised discretion in providing remedy other than precluding testimony).

## RULE 16. PRETRIAL MOTION PRACTICE; OMNIBUS HEARING.

**Rule 16.1(c) General provisions—Effect of failure to make motions in timely manner.**

**16.1.c.030** If the objection is one that the party could have made during the trial, the trial court has the discretion to consider the matter by motion, even though the party did not file the motion 20 days before trial.

*State v. Alvarez,* 228 Ariz. 579, 269 P.3d 1203, ¶ 11 (Ct. App. 2012) (during opening statement, defendant's attorney discussed possible third-party culpability and state objected; after opening statements, state again objected, and trial court precluded that evidence; because state could have objected to admission of evidence of third-party culpability during trial, state was not required to filed written objection 20 days prior to trial, and trial court did not abuse discretion in considering state's objection made after trial had started).

## ARTICLE V. PLEAS OF GUILTY AND NO CONTEST.

### RULE 17. PLEAS OF GUILTY AND NO CONTEST.

**Rule 17.3(b) Duty of court to determine voluntariness and intelligence of the plea—Voluntary nature of the plea.**

**17.3.b.080** If the trial court did not advise the defendant about a certain matter, or misadvised the defendant about a certain matter, and the omitted matter or the incorrect advice had an effect on the sentence actually imposed, the plea would be considered involuntary, but if the trial court then sentences the defendant consistent with what the trial court actually told the defendant, the defendant will not suffer prejudice and will not be entitled to have the plea set aside.

*State v. Villegas,* 230 Ariz. 191, 281 P.3d 1059, ¶¶ 3–13 (Ct. App. 2012) (trial court did not inform defendant he would have to serve sentences flat-time; defendant contended prospect of being released after serving 80 percent of sentence imposed was incentive to entering into plea agreement; trial court resentenced defendant, imposing sentences of 80 percent of what it had previously imposed; court held time defendant would actually serve under new sentences was identical with time he thought he would serve for sentences under plea agreement, thus defendant suffered no further prejudice and therefore was not entitled to have his plea set aside).

**Rule 17.6 Admission of a prior conviction.**

**17.6.070** If a defendant fails to object to the failure of the trial court to follow Rule 17.6 procedure when the defendant admits or stipulates to the existence of a prior conviction, the court must review for fundamental error, thus in order to obtain relief, the defendant must show prejudice, which requires a showing that the defendant would not have admitted or stipulated to the prior conviction if the trial court had followed the proper Rule 17.6 procedure, and defendant, on appeal, at the very least, must assert he or she would not have admitted the prior conviction if a proper colloquy had taken place.

*State v. Young,* 230 Ariz. 265, 282 P.3d 1285, ¶¶ 9–11 (Ct. App. 2012) (court found record established trial court advised defendant of all necessary matters, but further held defendant failed to show any prejudice because defendant nowhere claimed he would not have admitted prior convictions if proper colloquy had taken place).

## ARTICLE VI. TRIAL.

### RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

**Rule 18.4(b) Challenges—Challenges for cause.**

**18.4.b.020** The trial court may strike a juror for cause when it appears that the juror cannot render a fair and impartial verdict, which happens when a juror indicates a predisposition for or against a party or a witness, or when a juror indicates he or she could not follow the trial court's instructions.

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 17–20 (2012) (because of defendant's drug addiction and widespread drug use among his friends and family, written questionnaire asked prospective jurors about drug addiction; prospective juror disclosed two of her brothers had died of heroin overdoses; when questioned, prospective juror said it was upsetting her and she did not know if she could be fair to prosecution; court held trial court did not abuse discretion in excusing that juror).

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 39–40 (2012) (after juror submitted clarifying question, prosecutor asked question in way that offended juror; juror reported to bailiff she was "humiliated," had missed several minutes of testimony because she was upset, and was not sure she could ever side with state thereafter; court held trial court did not abuse discretion in striking that juror).

**Rule 18.4(c) Challenges—Peremptory challenges.**

**18.4.c.100** A *Batson* challenge involves three steps, the **first** of which is that the party must make out a *prima facie* case of purposeful discrimination.

*State v. Bustamante,* 229 Ariz. 256, 274 P.3d 526, ¶ 13 (Ct. App. 2012) (prosecutor struck potential juror who, like defendant, was Hispanic).

**18.4.c.130** A *Batson* challenge involves three steps, the **second** of which is that, once a party has made out a *prima facie* case of purposeful discrimination, the burden shifts to the other party to show a nondiscriminatory explanation for the strike, which need not rise to the level justifying exercise of a challenge for cause.

*State v. Bustamante,* 229 Ariz. 256, 274 P.3d 526, ¶ 13 (Ct. App. 2012) (prosecutor struck potential juror who, like defendant, was Hispanic; prosecutor stated he struck potential juror because "she had some language issues" and because she was a teacher and "I generally don't have teachers on my list when I get down to an exclusion number"; trial court found reasons were race neutral).

**18.4.c.160** A *Batson* challenge involves three steps, the **third** of which is that, once a party has made a *prima facie* case of purposeful discrimination and the other party has shown a non-discriminatory explanation for the strike, the burden shifts back to the moving party to show the strike was for an improper reason; court will not reverse ruling of trial court unless reasons given are clearly pretextual.

*State v. Bustamante,* 229 Ariz. 256, 274 P.3d 526, ¶ 17 (Ct. App. 2012) (prosecutor struck potential juror who, like defendant, was Hispanic; prosecutor stated he struck potential juror because "she had some language issues" and because she was a teacher and "I generally don't have teachers on my list when I get down to an exclusion number"; trial court found reasons were race neutral; for first time on appeal, defendant contended record failed to show juror had some language issues; court stated defendant, by failing to object to prosecutor's characterization of prospective juror's language problems, failed to meet his burden to show this reason was merely pretext for racial discrimination).

**Rule 18.5(h) Procedure for selecting a jury—Selection of jury.**

**18.5.h.020** The clerk is supposed to select the alternates by lot, but if the trial court designates the alternates, the defendant is entitled to relief only if the defendant can show prejudice.

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 43–44 (2012) (trial lasted longer than expected, thus trial court was not able to begin penalty phase when planned; one juror had made vacation plan for time when penalty phase would then be held, and two jurors had prepaid tickets to leave town, so trial court designated these jurors as alternates; court held defendant failed to show prejudice in that procedure).

**RULE 19. TRIAL.**

**Rule 19.1 Conduct of trial—Discretion.**

**19.1.a.010** The court has discretion in the conduct of the proceeding, as long as the method chosen does not prejudice the defendant.

*State v. Hausner,* 230 Ariz. 60, 280 P.3d 604, ¶¶ 81–82 (2012) (defendant contended trial court erred in refusing to allow him to present surrebuttal evidence to state's other act evidence; court held defendant had opportunity to deny other act evidence during his testimony, and trial court did not abuse discretion in refusing to allow surrebuttal testimony).

**Rule 19.1(mmt) Conduct of trial—Motion for mistrial.**

**19.1.mmt.010** The decision whether to grant a mistrial is within the sound discretion of the trial court, and that decision will not be reversed on appeal unless the conduct at trial is palpably improper and clearly injurious.

*State v. Alvarez,* 228 Ariz. 579, 269 P.3d 1203, ¶¶ 12–13 (Ct. App. 2012) (after opening statements, trial court granted State's motion to preclude evidence of third-party culpability; defendant contended trial court should have granted his motion for mistrial because he did not have chance to investigate or prepare any alternative theory of defense; because water bottle with defendant's DNA was found inside of house that was burglarized and defendant did not identify any other viable defense strategy he could have developed in view of that DNA evidence; court held trial court did not abuse discretion in denying defendant's motion for mistrial).

**19.1.mmt.100** To determine whether the **prosecutor's** remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether the remarks or actions call to the attention of the jurors matters that they would not be justified in considering, and (2) the probability that the jurors, under the circumstances of the case, were influenced; further, the defendant must show the offending statements were so pronounced and persistent that they permeated the entire atmosphere of the trial and so infected the trial with unfairness that they made the resulting conviction a denial of due process.

*State v. Nelson,* 229 Ariz. 180, 273 P.3d 632, ¶¶ 37–41 (2012) (in penalty phase closing argument, prosecutor described female victim (14 years, 10 months) as "a helpless victim," asked why did he have to kill her, and noted brutality of killing; state did not allege (F)(6) aggravating factor; defendant contended prosecutor erred in arguing to jurors elements of (F)(6) aggravating factor; court noted prosecutor's argument was based on facts of case, and although "helpless" and "defenseless" are terms used to describe (F)(6) aggravating factor, prosecutor did not suggest its existence by using these words, nor did she argue jurors should consider that factor; moreover, jurors were unaware of legal significance of those words because trial court did not instruct on (F)(6) aggravating factor; court found no error).

*State v. Loney,* 230 Ariz. 542, 287 P.3d 836, ¶¶ 8–13 (Ct. App. 2012) (51-year-old defendant was convicted of sexual conduct with 16-year-old victim; in closing argument, defendant's attorney attacked victim's credibility; in rebuttal, prosecutor discussed testimony officer had given about characteristics of sex offenders; defendant contended prosecutor's comments improperly asked jurors to find defendant guilty because he fit sexual predator profile; because there was evidence defendant had engaged in conduct like that described by officer, court held prosecutor was permitted to draw comparisons between defendant and sexual predator profile).

**19.1.mmt.110** A **prosecutor's** actions constitute reversible error only if (1) misconduct exists, and (2) a reasonable likelihood exists that the misconduct could have affected the jurors' verdict.

*State v. Patterson,* 230 Ariz. 270, 283 P.3d 1, ¶¶ 20–21 & n.5 (2012) (defendant contended prosecutor "sighed inappropriately, smirked at the questions proposed by the defense, and consistently called attention to [her]self by head nodding, and other unprofessional conduct"; court stated record did not support defendant's contention in that, for only motion defendant filed accusing prosecutor of unprofessional conduct, trial court did not confirm that any alleged behavior actually occurred, and even if it did, defendant did not show it amounted to persistent and pervasive misconduct that denied him fair trial; court further noted one juror submitted question form asking trial court to tell prosecutor to stop rolling her eyes and talking during testimony, describing conduct as "distracting" and "unprofessional," and stated juror appeared to have concluded, rather than prejudicing defendant, prosecutor's conduct reflected poorly on State).

*State v. Martinez,* 230 Ariz. 208, 282 P.3d 409, ¶¶ 26–27 (2012) (trial court warned prosecutor to watch her conduct because she tended to give big, audible sigh, throw up her hands, and roll her eyes when trial court ruled against her; defendant's attorney noted prosecutor continued to roll her eyes during witness testimony; during post-deadlock debriefing, juror said prosecutor's eye-rolling was counter-productive and damaging to her credibility; trial court found prosecutor did not engage in any intentional misconduct, and any effect was damaging to state's case).

RULE 21. INSTRUCTIONS.

**Rule 21.1 Applicable law.**

**Identification.**

**21.1.217** Although the trial court is not required to hold a *Dessureault* hearing if the suggestive situation was not caused by the police, the defendant is still entitled to a cautionary identification instruction.

*State v. Nottingham,* 231 Ariz. 21, 289 P.3d 949, ¶¶ 4–10 (Ct. App. 2012) (three separate convenience stores were robbed; police showed photographic lineups to three store clerks, and none was able to identify defendant; over defendant's objection, store clerks were permitted to identify defendant at first trial, which resulted in mistrial; defendant contended trial court erred in refusing to hold *Dessureault* hearing before second trial and in allowing store clerks to identify him at second trial; court noted United States Supreme Court recently held in *Perry v. New Hampshire* Due Process Clause does not require trial court to hold preliminary assessment of reliability of eyewitness identification made under suggestive circumstances when suggestive situation was not caused by police; court held, even though first trial created suggestive situation, that was not caused by police, thus trial court did not err in not holding *Dessureault* hearing and in allowing store clerks to identify defendant; court held, however, defendant was entitled to cautionary identification instruction and trial court erred in not giving one).

**Lesser-included offenses.**

**21.1.310** Trial court must instruct on the offense charged and any offense necessarily included in the charged offense if the evidence supports such a lesser-included offense, and both the defendant and the state are entitled to such a lesser-included offense instruction.

*State v. Nelson,* 229 Ariz. 180, 273 P.3d 632, ¶ 24 (2012) (because trial court gave second-degree murder instruction and jurors still convicted defendant of first-degree murder, defendant showed no prejudice in trial court's refusal to instruct on manslaughter).

*State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶ 66 (2012) (because trial court gave second-degree murder instruction and jurors still convicted defendant of first-degree murder, defendant showed no prejudice in trial court's refusal to instruct on manslaughter).

**21.1.315** If the evidence supports a lesser-included offense, if both the defendant and the state object to a lesser-included offense instruction, the trial court should be loath to give such an instruction absent compelling circumstances, but if the trial court gives that instruction and the evidence supports it, a resulting conviction for the lesser-included offense does not violate the defendant's constitutional rights or contravene any Arizona statute or rule.

*State v. Gipson,* 229 Ariz. 484, 277 P.3d 189, ¶¶ 12–17 (2012) (defendant was charged with first-degree murder; trial court instructed on first-degree murder; instructed on second-degree murder over defendant's objection; and instructed on manslaughter over objection of both defendant and state; jurors convicted defendant of manslaughter; court concluded evidence supported conviction; court held trial court did not err in giving that instruction).

**21.1.320** Although the trial court must instruct on the offense charged and any offense necessarily included in the charged offense, if there is no evidence to support a lesser-included offense, the trial court should not give a lesser-included offense instruction.

*State v. Patterson,* 230 Ariz. 270, 283 P.3d 1, ¶¶ 26–27 (2012) (defendant contended trial court erred in rejecting requested manslaughter instruction; court noted mutual combat, if it occurred at all, ended at least 10 minutes before victim fled from apartment, and no reasonable juror could have found unarmed victim had done anything constituting "adequate provocation" for defendant to chase her from apartment, run her down, and stab her to death).

**21.1.353** A defendant does not have an absolute right to present an all or nothing defense,

*State v. Gipson,* 229 Ariz. 484, 277 P.3d 189, ¶¶ 7–11 (2012) (although supported by evidence, both defendant and state objected to manslaughter instruction; court held trial court did not err in giving that instruction).

**13–1105 First degree murder—Lesser-included offense instruction.**

**21.13.1105.260** Under Arizona law, first-degree murder is one crime in Arizona, whether it is committed by premeditated murder or by felony murder, and although it is the preferred practice to give the jurors a verdict form that allows them to indicate on which theory or theories they based their verdict, there is no requirement that the trial court do so.

*State v. Hardy,* 230 Ariz. 281, 283 P.3d 12, ¶¶ 28–31 (2012) (defendant requested that trial court give separate verdict forms for premeditated murder and felony murder; trial court opted to use single verdict form without differentiation; court held trial court did not err in doing so, but strongly urged trial courts to use alternate forms of verdict).

## ARTICLE VII. POST-VERDICT PROCEEDINGS.

### RULE 24. POST-TRIAL MOTIONS.

**Rule 24.1(c)(2) Motion for new trial—Prosecutorial misconduct.**

**24.1.c.252** Prosecutorial vouching **does not exist** if the prosecutor does not place the prestige of the government behind its witness.

*State v. Martinez,* 230 Ariz. 208, 282 P.3d 409, ¶¶ 29–33 (2012) (court rejected defendant's contention that prosecutor's rolling of her eyes during witness testimony was vouching, but found prosecutor's conduct troubling and highly inappropriate, and strongly disapproved of that conduct).

**Rule 24.1(d) Motion for new trial—Admissibility of juror evidence to impeach the verdict.**

**24.1.d.020** The trial court is not allowed to inquire into the subjective motives or mental processes that lead a juror to assent or dissent from the verdict.

*State v. Nelson,* 229 Ariz. 180, 273 P.3d 632, ¶¶ 47–48 (2012) (defendant submitted affidavit from juror stating jurors did not follow instructions and that juror felt "emotionally sabotaged" by prosecutor's closing argument; court declined defendant's invitation to abandon rule that juror's testimony is not admissible to impeach verdict).

**Rule 24.2(a) Motion to vacate judgment—Jurisdiction and timeliness.**

**24.2.a.020** The 60 days runs from the entry of judgment ***and*** sentence, thus if an appellate court affirms the judgment and remands for resentencing, that does not start the running of a new time period.

*State v. Nordstrom,* 230 Ariz. 110, 280 P.3d 1244, ¶¶ 23–26 (2012) (judgments and sentences were entered May 1998; court affirmed convictions but remanded for resentencing; after jurors imposed death sentence in September 2009, defendant filed motion to vacate judgments; court held validity of convictions was not before court in 2009, thus motion to vacate judgments was untimely).

### RULE 27. PROBATION AND PROBATION REVOCATION.

**Rule 27.8(b)(1) Revocation of probation—Violation hearing—Conditions.**

**27.8.b.130** If a defendant has signed a written consent to disclosure of records from a drug treatment program, the drug treatment program may disclose to the trial court the defendant's records without violating federal law.

*State v. Tatlow,* 231 Ariz. 34, 290 P.3d 228, ¶¶ 6–14 (Ct. App. 2012) (defendant contended disclosure of his records from drug treatment program violated federal law; court first noted record did not support defendant's contention program actually received federal assistance, and even if it did, defendant signed written consent to disclosure as condition of participation in program, thus trial court properly considered defendant's records from that program).

*State v. Tatlow,* 231 Ariz. 34, 290 P.3d 228, ¶¶ 15–17 (Ct. App. 2012) (state presented evidence that defendant caused the forgery of his signature on attendance sheet, failed to abide by Special Regulations of drug court program, failed to comply with directions of treatment provider, and failed to comply with requirements of drug court program, thus state presented sufficient evidence to support revocation of defendant's probation.

## ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

### RULE 30. APPEALS FROM NON-RECORD COURTS.

**Rule 30.3 Preparation of record and stay of sentence.**

**30.3.010** Upon receiving notification of an appeal from a limited jurisdiction court, the presiding officer shall immediately stay any sentence requiring the incarceration of the defendant,

*Scheerer v. Munger,* 230 Ariz. 137, 281 P.3d 491, ¶10 (Ct. App. 2012) (once state filed notice of appeal, trial court should have stayed sentence).

### RULE 31. APPEAL FROM SUPERIOR COURT.

**Rule 31.8(a) The record on appeal; transcripts; duty of court reporter—Composition of the record on appeal; additions; deletions.**

**31.8.a.050** The appellant has the duty to see that the record supports the claim on appeal; any matter not contained in the record is presumed to support the action of the trial court.

*State v. Nuckols,* 229 Ariz. 266, 274 P.3d 536, ¶ 3 n.1 (Ct. App. 2012) (trial court denied restitution because state did not file in timely manner; state appealed; court noted state did not provide transcript of hearing when trial court deferred ruling on restitution).

**Rule 31.13(c) Appellate briefs—Contents—*Anders* brief.**

**31.13.c.320** To comply with the requirements of *Anders v. California,* the appellate court first reviews the *Anders* brief and any supplemental briefs, and if the court determines a non-frivolous issue exists, the court should inform the parties of its determination, strike the brief, and direct counsel to proceed with briefing as with any other criminal appeal; if the court does not find any such issues based on its review of the briefs, the court will undertake its own review of the record in search of reversible error; if the court then discovers any issues based on its review of the record, the court will issue an order for the parties to brief any issues it has discovered; if the court finds only frivolous issues in its extended review, it will address any issues raised *pro se* by the defendant, affirm the conviction and sentence, and then permit defense counsel to withdraw.

*State v. Thompson,* 229 Ariz. 43, 270 P.3d 870, ¶¶ 5–6 (Ct. App. 2012) (both brief filed by defendant's attorney and brief filed by defendant *pro se* raised issue whether juror violated trial court's admonition by conducting Internet research and discovering defendant and one of defendant's witnesses and person defendant blamed for burglary all had prior criminal convictions; court entered order striking brief filed by defendant's attorney and directing defendant's attorney to address that issue).

**Rule 31.24 Citation of memorandum decision.**

**31.24.010** A memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case, or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review.

*State v. Johnson,* 229 Ariz. 475, 276 P.3d 544, ¶ 23 (Ct. App. 2012) (court held it was impermissible to support argument on appeal with memorandum decision).

RULE 32. OTHER POST-CONVICTION RELIEF.

**Rule 32.1(e) Scope of remedy—Newly-discovered evidence.**

**32.1.e.012** To warrant post-conviction relief based on newly-discovered evidence, the material must meet five requirements, the **second** of which is that the defendant showed diligence in discovering the facts and bringing them to the trial court's attention.

*State v. Hess,* 231 Ariz. 80, 290 P.3d 473, ¶¶ 6–8 (Ct. App. 2012) (trial court found method of DNA testing had been available since 1988 and it took 10 more years for testing that led to defendant's claims, and defendant gave no explanation why he could not have presented this evidence sooner, which alone would justify trial court's denial of Rule 32 relief).

**32.1.e.015** To warrant post-conviction relief based on newly-discovered evidence, the material must meet five requirements, the **fifth** of which is that the evidence must be such that it probably would have altered the verdict, finding, or sentence if known at the time of the trial.

*State v. Hess,* 231 Ariz. 80, 290 P.3d 473, ¶ 12 (Ct. App. 2012) (defendant presented as newly-discovered evidence DNA results that excluded him as contributor to sperm obtained from sample taken from victim's vagina and sample taken from toilet in restroom where victim was assaulted; court noted (1) there was no evidence attacker had any contact with toilet, (2) state presented evidence that attacker had not ejaculated in victim, and (3) state presented evidence that sperm obtained from sample taken from victim's vagina was that of her fiancé who recently had sexual intercourse with her; court held trial court did not abuse discretion in determining defendant's newly-discovered evidence would not have changed verdict).

**32.1.e.017** In determining whether newly-discovered evidence probably would have altered the verdict, the trial court is permitted to consider evidence the state presents that it had not presented at trial.

*State v. Hess,* 231 Ariz. 80, 290 P.3d 473, ¶¶ 9–11 (Ct. App. 2012) (court states nothing in Rule 32.1(e) requires trial court to narrow artificially scope of its inquiry by ignoring evidence state undoubtedly would offer at new trial in response to defendant's new evidence).

**Rule 32.2(a) Preclusion of remedy—Preclusion.**

**32.2.a.040** A defendant may not obtain relief on any ground that defendant has waived in a previous collateral proceeding by not presenting that claim.

*State v. Diaz,* 228 Ariz. 541, 269 P.3d 717, ¶¶ 3–5 (Ct. App. 2012) (defendant's first PCR attorney sought numerous countenances from trial court, which ultimately dismissed proceeding with prejudice; appellate court granted review, but denied relief; defendant's second PCR attorney sought numerous countenances from trial court, which again dismissed proceeding with prejudice; because appellate court addressed conduct of defendant's first PCR attorney in defendant's first petition for review, defendant was precluded from raising that issue in second petition for review).

**Rule 32.2(b) Preclusion of remedy—Exceptions.**

**32.2.b.020** The preclusion provisions in Rule 32.2(a) do not apply to claims based on newly-discovered evidence under Rule 32.1(e) or actual innocence under Rule 32.1(h).

*State v. Gutierrez,* 299 Ariz. 573, 278 P.3d 1276, ¶ 35 (2012) (drive-by shooting occurred in 1998; when arrested that night, defendant was riding in front passenger's seat and testing of his hands showed gunshot residue; witness testified gunman had bandana over face and was wearing black cap; along route shooters took leaving scene, police found black cap bearing gang insignia of defendant's gang; state's theory was defendant had fired the fatal shot; defense theory was defendant was merely present and had no idea shooting would happen; jurors convicted defendant of second-degree murder; in 2007, hair and sweat stain were found in black cap, and DNA testing revealed hair belonged to another person in car and stain had mixture of DNA from at least three individuals, none of whom was defendant; because defendant was claiming newly-discovered evidence and actual innocence, court held trial court erred in ruling these claims were precluded).

**Rule 32.6(c) Additional pleadings; summary disposition; amendments—Summary disposition.**

**32.6.c.030** A petitioner is entitled to an evidentiary hearing if the petition presents a colorable claim, which exists when the facts alleged by the petitioner in support of the claim, if taken as true, might have changed the outcome.

*State v. Gutierrez,* 299 Ariz. 573, 278 P.3d 1276, ¶¶ 19–34 (2012) (drive-by shooting occurred in 1998; when arrested that night, defendant was riding in front passenger's seat and testing of his hands showed gunshot residue; witness testified gunman had bandana over face and was wearing black cap; along route shooters took leaving scene, police found black cap bearing gang insignia of defendant's gang; state's theory was defendant had fired the fatal shot; defense theory was defendant was merely present and had no idea shooting would happen; jurors convicted defendant of second-degree murder; in 2007, hair and sweat stain were found in black cap, and DNA testing revealed hair belonged to another person in car and stain had mixture of DNA from at least three individuals, none of whom was defendant; court held this evidence was "favorable" to defendant under A.R.S. § 13–4240(K) and thus trial court was required to hold non-evidentiary hearing to permit parties to argue why petitioner should or should not be entitled to relief or further evidentiary hearing as matter of law; because new evidence did not exonerate defendant, defendant was not entitled to evidentiary hearing at this point).

**Rule 32.9(c) Review—Petition for review.**

**32.9.c.010** The petition for review must contain the issues that were decided by the trial court, thus a defendant may not obtain relief based on issues never presented to the trial court in the petition for post-conviction relief.

*State v. Hess,* 231 Ariz. 80, 290 P.3d 473, ¶ 16 (Ct. App. 2012) (defendant contended he was entitled to resentencing because his claimed newly-discovered evidence casts doubt on his guilt; because defendant did not present this claim to trial court, court would not consider it on review).

**32.9.c.030** Because the petition for review must contain the reasons why the petition should be granted, it will not suffice merely to incorporate by reference arguments made to the trial court.

*State v. Hess,* 231 Ariz. 80, 290 P.3d 473, ¶ 13 (Ct. App. 2012) (in petition for review, defendant did not address trial court's discussion of witnesses' identification of him at trial, and instead appeared to incorporate by reference arguments made to the trial court).